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No. 85-628 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KENNETH P. BIPPUS, et al.,
Petitioners,

vs

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,
Respondents.

On A Petition For A Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the six month statute of limitations held applicable to § 301 fair representation/breach of contract suits in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S 151 (1983), should be applied retroactively to cases pending when *DelCostello* was decided.

2. Whether the pendency before the National Labor Relations Board of an unfair labor practice charge tolls the running of the six month statute of limitations held applicable to § 301 fair representation/breach of contract suits n *DelCostello* v. *International Brotherhood of Teamsters.*

3. Whether the District Court below properly granted the motions of respondents for summary judgment on the basis of the applicable statute of limitations, where the record, read in light most favorable to petitioners, establishes that there is no genuine issue as to any material fact.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT FOR DENYING THE PETITION	5
I. *DELCO. TELLO* HAS NOT BEEN LIMITED TO PROSPECTIVE APPLICATION.	5
II. THE PENDENCY OF AN UNFAIR LABOR PRACTICE CHARGE BEFORE THE NLRB DOES NOT TOLL THE APPLICABLE STATUTE OF LIMITATIONS.	8
III. THE DISTRICT COURT BELOW PROPERLY CONCLUDED THAT THERE WAS NO GENUINE ISSUE AS TO ANY FACT MATERIAL TO THE DETERMINATION OF THE ACCRUAL OF PETITIONERS' CAUSE OF ACTION.	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	Page
Adkins v. *General Motors Corp.*, 573 F. Supp. 1188 (S.D. Ohio 1983)	10
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	9
Aragon v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 120 LRRM 2728 (1985)	9
Association of Frigidaire Model Makers v. *General Motors Corporation*, 573 F. Supp. 236 (S.D. Ohio 1983)	9
Barina v. *Gulf Trading & Transportation Co.*, 726 F.2d 560 (9th Cir. 1984)	6
Barnett v. *United Airlines, Inc.*, 738 F.2d 358 (10th Cir. 1984)	6
Bedat v. *McLean Trucking Co.* 119 LRRM 2945 (D.C. Conn. 1984)	8
Bey v. *Williams*, 590 F. Supp. 1150 (W.D. Pa. 1984)	8
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	6, 7
Corson v. *First Jersey Securities, Inc.*, 537 F. Supp. 1263 (D. N.J. 1982)	9
DelCostello v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983)	1, 4, 5, 6, 7, 8, 9 10
Edwards v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983)	5, 7
Edwards v. *Teamster Local No. 36*, 719 F.2d 1036 (9th Cir. 1983)	6

Page

Electrical Workers IUE Local 790 v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 9

Glover v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984) 6

Graves v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984) 5, 7

Holzsager v. *Valley Hospital*, 646 F.2d 792 (2d Cir. 1981) 7

Hand v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983) 6

Harpp v. *General Electric Co.*, 571 F. Supp. 426 (N.D. N.Y. 1983) 7

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 9

Kolomick v. *United Steelworkers of America District 8*, 762 F.2d 354 (4th Cir. 1985) 8, 10

Kremer v. *Chemical Construction Corp.*, 6[illegible] F. 2d 786 (2d Cir. 1980) 7

Landahl v. *PPG Industries*, 746 F.2d 1312 (7th Cir. 1984) 7

Layne & Bowler Corp. v. *Western Well Works*, 261 U.S. 387 (1923) 5

Lincoln v. *District 9 of Intern. Ass'n. of Machinists*, 723 F.2d 627 (8th Cir. 1984)..... 5, 7, 10

Martin v. *Adams Distribution Services*, 114 LRRM 3562 (W.D. Mo. 1983) 8

Page

Metz v. *Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 976 (1984) 10

Murray v. *Branch Motor Express Corp.*, 723 F.2d 1146 (4th Cir. 1983) 5, 7

Perez v. *Dana Corp., Parish Frame Div.*, 718 F. 2d 581 (3rd Cir. 1983) 5, 7, 10

Rogers v. *Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, __ U.S. __, 105 S.Ct. 292 (1984) 7, 10

Santos v. *District Council of New York City, Etc.*, 619 F.2d 963 (2d Cir. 1980) 10

Smith v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) 5

Storck v. *International Brotherhood of Teamsters, Etc.*, 712 F.2d 1194 (7th Cir. 1983) 5

Weed v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713 (N.D. Tex. 1983) 9

Welyczko v. *U.S. Air, Inc.*, 733 F.2d 239 (3d Cir. 1984) 5

Statutes:

Title 29, U.S.C. § 160 (b) (§ 10(b) of the National Labor Relations Act) 7

Title 29, U.S.C. § 185 (§ 301 of the Labor Management Relations Act) 2

Title 42, U.S.C. § 2000e-5 (§ 706 of Title VII of the Civil Rights Act of 1964) 9

Title 42, U.S. § 1981 9

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Both the opinion of the District Court for the Southern District of Ohio, and the opinion of the Court of Appeals for the Sixth Circuit are unreported. Copies of these opinions are included in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 17, 1985. A copy thereof is included in the Appendix of the Petition, which was filed on October 11, 1985, and invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED

The Petition relies on the following:

1. Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(F)(1).

3. Ohio Revised Code §§ 2305.07; 2305.09; 2305.10.

4. Rule 56(c) of the Federal Rules of Civil Procedure. The text of these statutes and rules are included in the Appendix to the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioners are former employees of Respondent Reading Central Mixed Concrete (hereinafter "Reading") who on November 16, 1981 filed an action in the District Court below alleging breach of the collective bargaining agreement by their former employer and breach of the duty of fair representation by Respondent Local 100 of the International Brotherhood of Teamsters (hereinafter "Local 100"), their Union. This "hybrid" fair representation/breach of contract suit was brought under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185.

On January 2, 1981 Reading sold its assets to Respondent Reading Concrete, Inc., a subsidiary of SDI Industries, Inc. (hereinafter "SDI"). The Petitioners had been laid off by Reading on the last working day of 1980 and were not rehired by SDI after its acquisition of Reading's business.

Petitioners claimed in the Courts below that Article 16 of the collective bargaining agreement between Reading and Local 100 required any purchaser of Reading's business to assume the existing labor contract. Petitioners alleged that Reading violated that agreement by entering into a purchase agreement with SDI which did not require SDI to assume the contract and that Local 100 violated its duty of fair representation by failing to take action to enforce Article 16 of the contract. Petitioners specifically alleged that Local 100 acted in an arbitrary, discriminatory and bad faith manner towards the Petitioners when it refused to process grievances filed against Reading under Article 16 following their layoff.

On January 12 and 13, 1981, Petitioner Donald Browning, the Union steward at Reading, filed the grievances protesting the allegedly improper discharge of certain former Reading employees following the transfer of the business to Respondent SDI. After delivering copies of these grievances to SDI, Browning took copies to Union President Gairald Kiser and Business Agent Kenneth Watson. As it was Kiser's belief that the collective bargaining contract with Reading did not require assumption of the union contract by a buyer of the business, he told Browning during conversations in January that he was going to keep out of Reading's business and that "he would do nothing concerning Reading's grievances and he would not spend any more union money on [those] grievances". Watson also told

Browning that nothing further could be done without Kiser's authorization.

Although Local 100 refused to initiate the contractual grievance procedure on behalf of Petitioners, the Union did provide them with an attorney to process an unfair labor practice charge before the NLRB. The Petitioners appeal to the NLRB General Counsel was ultimately denied.

On November 16, 1981, Petitioners filed the instant lawsuit, some nine months after they realized that the Union would not process their contractual grievances. On January 10, 1984, said action was dismissed by the district court, Honorable Timothy S. Hogan presiding, on the grounds that, drawing all inferences in a light most favorable to Petitioners, there was no genuine issue of material fact as to when the Petitioner's cause of action arose; and that because said cause of action had accrued no later than early February, 1981, the action was barred by the six month statute of limitations held applicable by this Court in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1981). The district court also held that pendency of unfair labor practice charges before the NLRB did not toll the running of said statute of limitations. The Court of Appeals affirmed the district court's judgment on July 17, 1985.

ARGUMENT FOR DENYING THE PETITION

III. DELCOSTELLO HAS NOT BEEN LIMITED TO PROSPECTIVE APPLICATION.

Petitioners argue that a conflict exists between the cir cuit courts of appeal concerning the retroactive application of *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Because certiorari is denied absent "principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923), careful scrutiny by this Court of the alleged conflict among the circuits is warranted.

Contrary to the contention of Petitioners, there is little variance among the courts of appeals as to the proper application of *DelCostello* to cases arising prior to the date of that decision, June 8, 1983. Opinion on this issue in the circuits is almost uniform. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have all held that *DelCostello* should be given retroactive effect. *See Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984); *Perez* v. *Dana Corp., Parish Frame Div.*, 718 F.2d 581 (3d Cir. 1983); *Murray* v. *Branch Motor Express Corp.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Storck* v. *International Brotherhood of Teamsters, Etc.*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9 of Intern. Ass'n of Machinists*, 723 F.2d 627 (8th Cir. 1983);

Barnett v. *United Airlines, Inc.*, 738 F.2d 358 (1984); *Hand* v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983). Nearly all of the reported district court decisions have applied *DelCostello* retroactively as well.

Thus, the Ninth Circuit stands virtually alone in finding that *DelCostello* should not always be applied retroactively. *Barina* v. *Gulf Trading & Transportation Co.*, 726 F.2d 560 (1984), and *Edwards* v. *Teamsters Local No. 36*, 719 F.2d 1036 (1983). Even the Ninth Circuit, however, applies the case retroactively when its effect does not shorten, but lengthens, the time in which a plaintiff may file a "hybrid" action under § 301. *See Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984).

In the aforementioned cases the Ninth Circuit has applied the guidelines set forth by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) to decide whether or not *DelCostello* should be given retroactive effect. The factors specified in *Chevron* are: (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question and (3) whether applying the new decision will produce substantial inequitable results. In *Barina* the Ninth Circuit, while refusing to apply *DelCostello* retroactively, conceded that the second *Chevron* factor favors retroactive application of the case, stating: "A substantial purpose behind the six-month limitation developed in *DelCostello* is to give finality to labor disputes." 726 F.2d at 564. It is well established that, because of the strong presumption in favor of retroactivity in cases such as this, all three *Chevron* factors must mitigate against retroactivity before courts will give a case prospective only effect. *See*

Rogers v. *Lockheed-Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir. 1983), *cert. denied*, __ U.S. __, 105 S. Ct. 292 (1984); *Holzsager* v. *Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981); *Harpp* v. *General Electric Co.*, 571 F. Supp. 426, 432 (N.D. N.Y. 1983); *accord*, *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786, 789-90 (2d Cir. 1980), *aff'd.* 456 U.S. 461 (1982). Moreover, several courts have performed their own analysis under the *Chevron* guidelines and found *DelCostello* to have retroactive effect. *See Graves*, 736 F.2d at 821-22; *Landahl* v. *PPG Industries*, 746 F.2d 1312, 1315 (7th Cir. 1984); *Edwards*, 720 F.2d at 862; *Lincoln*, 723 F.2d at 630; *Murray*, 723 F.2d at 1140; *Perez*, 718 F.2d at 508; and *Rogers*, 720 F.2d at 1250.

A conflict between the circuit courts of appeal warranting a grant of certiorari should be premised upon irreconcilable holdings. Such a conflict is not presented here, as the decision of the court below represents the overwhelming majority, as well as correct, view on the retroactivity of the *DelCostello* issue. Petitioners have not shown a clear and substantial conflict on this issue. It is also clear that at this time the issue is not likely to recur in many cases, where a § 301 cause of action arose before the date of the *DelCostello* decision.

Finally, it should be noted that Petitioners had not, until the instant petition, contended that *DelCostello* should only be applied prospectively. In their brief to the Court of Appeals below, Petitioners "concede[d] that the correct limitations period to apply in a hybrid § 301/fair representation action is the six month limitations period in § 10(b) of the NLRA, as held by the United States Supreme Court in *DelCostello* . . ." Thus, because the Petitioners until now had not raised, and the Court below did not consider, the issue of retroactive ap-

plication of *DelCostello*, this case is a poor choice for disposition of the alleged conflict therein.

II. THE PENDENCY OF AN UNFAIR LABOR PRACTICE CHARGE BEFORE THE NLRB DOES NOT TOLL THE APPLICABLE STATUTE OF LIMITATIONS.

Petitioners contend that pursuit of relief before the National Labor Relations Board should toll the running of the applicable statute of limitations. Petitioners also contend that the decision below conflicts with other court of appeals decisions as to the tolling of the statute of limitations.

Numerous federal courts have considered this same issue, and virtually every decision is in accord with the ruling below that the pendency of an unfair labor practice charge before the NLRB does not act to toll the running of the six month statute of limitations for filing a § 301 suit for fair representation/breach of contract. *See Kolomick* v. *United Steelworkers of America, District 8*, 762 F.2d 354 (4th Cir. 1985) ("[a] rule tolling the time period within which to file a § 301 claim in federal court simply by virtue of filing a claim with the NLRB would be contrary to the rationale underlying *DelCostello* and would not effectuate congressional goals." 762 F.2d at 356); *Bedat* v. *McLean Trucking Co.*, 119 LRRM 2945 (D.C. Conn. 1984) ("[w]here two such distinct avenues for potentially quite different relief do exist, a plaintiff's pursuit of one need not and should not toll the limitations period for pursuit of the other." 119 LRRM at 2947); *Bey* v. *Williams*, 590 F. Supp. 1150 (W.D. Pa. 1984); *Martin* v. *Adams Distribution Services*, 114 LRRM 3562 (W.D. Mo. 1983) ("[a] decision not to toll is

also supported by Congress' desire, as evidenced by section 10(b) to ensure finality of private settlements of employer-employee conflicts within a relatively short period of time." 114 LRRM at 3566); *Weed* v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713 (N.D. Tex. 1983); *Association of Frigidaire Model Makers* v. *General Motors Corp.*, 573 F. Supp. 236 (S.D. Ohio 1983).

The determination of the aforementioned courts that a hybrid § 301 action is entirely independent of any and all NLRB proceedings and that such NLRB proceedings do not toll the statute of limitations for the § 301 claim is largely based on this Court's decision in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1979). In *Johnson* this Court held that the timely filing of a charge with the Equal Employment Opportunity Commission pursuant to § 706 of Title 7 of the Civil Rights Act of 1964 did not toll the running of the applicable statute of limitations to the action, which was brought under Title 42 U.S.C. § 1981. This Court held that because the two potential remedies involved under these statutes were "truly independent . . . [there is] no policy reason that excuses [plaintiff's] failure to take the minimal steps necessary to preserve each claim independently". *Johnson, supra*, 421 U.S. at 465-466. *Accord, Electrical Workers IUE Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Corson* v. *First Jersey Securities, Inc.*, 537 F. Supp. 1263, 1267-68 (D. N.J. 1982). This reasoning is entirely applicable to the instant case.

The only post-*DelCostello* decision cited by the Petitioners in support of their position is *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th

Cir. 1983), *cert. denied* __ U.S. __, 120 LRRM 2728 (1985). As with the issue of the retroactivity of *DelCostello*, the Ninth Circuit stands alone in its view of the principles governing the tolling of the statute of limitations in hybrid § 301 cases. The *Aragon* decision ignores the important federal policy of prompt resolution of labor disputes enunciated in *DelCostello*, 452 U.S. at 168. *Accord*, *Kolomick*, 762 F.2d at 357; *Lincoln*, 723 F.2d at 630; *Rogers*, 720 F.2d at 1150; *Perez*, 718 F.2d at 588.

The decision of the Court below clearly represents the overwhelming majority, as well as correct, view on the issue of tolling the applicable statute of limitations. Petitioners cannot show a clear and substantial conflict on this issue requiring resolution by this Court.

III. THE DISTRICT COURT BELOW PROPERLY CONCLUDED THAT THERE WAS NO GENUINE ISSUE AS TO ANY FACT MATERIAL TO THE DETERMINATION OF THE ACCRUAL OF PETITIONERS' CAUSE OF ACTION.

Petitioners argue that the District Court below, in examining a "sparce" and "mixed" record, failed to adhere to the proper legal standard in granting the Respondents' motion for summary judgment. Specifically, Petitioners contend that there is a genuine issue of material fact as to when their cause of action accrued. The record, however, does not support Petitioners' contention that they were entitled to any inferences which cast doubt upon the time that Petitioners "knew or reasonably should have known that a breach of the duty of fair representation had occurred". *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188, 1192 (S.D. Ohio 1983). *Ac-*

cord, *Metz* v. *Tootsie Roll Industries, Inc.*, 715 F.2d 299, 303-04 (7th Cir. 1983), *cert. denied*, __ U.S. __, 104 S. Ct. 976 (1984); *Santos* v. *District Council of New York City, Etc.*, 619 F.2d 963, 969 (2d Cir. 1980).

Statements made by Petitioner Browning in his deposition establish beyond doubt that by late January, 1981, he knew that the grievances he filed on behalf of the Petitioners would not be pursued. Browning's statements also make clear that at that time the Petitioners decided they needed to pursue other avenues to safeguard their rights. Moreover, Browning stated that after certain conversations with Kiser in January, 1981, Kiser would not even see him to discuss the grievances. Clearly, by February of 1981 Browning and the other Petitioners were well aware that Local 100 was not going to process their grievances. It was at this time that the Petitioners' action for breach of the duty of fair representation accrued. As such, Petitioners claim is now barred by the applicable six month statute of limitations.

Petitioners argue that the retainment of counsel by Local 100 to allow Petitioners to pursue relief before the NLRB indicated to Petitioners that satisfaction could ultimately be attained through the contractual grievance procedure. However, as Judge Hogan in the District Court below correctly concluded, this position does not help Petitioners. "The fact that the union reluctantly offered to permit a union hired attorney to pursue an independent remedy offers no support to plaintiffs' case. Regardless of [the attorney's] actions before the NLRB, the plaintiffs knew or should have known by early February, 1981 that nothing would be done on their contractual grievances. Therefore, the breach occurred at that time." (Order, p. 11, n.2).

It is clear, that the District Court did view the evidence giving all possible favorable inferences to Petitioners to which they were entitled, and properly concluded that, by early February, 1981, Petitioners knew or should have known that any claim of breach of the duty of fair representation they had against Local 100 had arisen.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of Certiorari.

Respectfully submitted,

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